

**Emenee Accessories, Inc. and Plastic Moulders & Novelty Workers' Union 132, International Ladies' Garment Workers' Union, AFL-CIO and Angel Luis Avila.** Cases 2-CA-18351, 2-CA-18425, and 2-CA-18509

30 September 1983

# DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS

On 18 October 1982, Administrative Law Judge Arthur A. Herman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent filed exceptions and a brief in support thereof, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>2</sup>

1. The judge failed to make any finding regarding the allegation that Respondent violated Section 8(a)(1) of the Act by interrogating employee Avila about his support for the Union. However, the judge did credit Avila's testimony that Respondent's president, Yahre, approached him in early September 1981<sup>3</sup> and asked him to sign a paper stating that he did not want the Union and that, shortly thereafter, Respondent's principal, Nieves, asked him why he would not sign the paper. On the basis of these credibility resolutions, we find that Respondent interrogated Avila in violation of Section 8(a)(1) of the Act.

2. We disagree with the judge that Respondent created an impression of surveillance of its employees' union activities in violation of Section 8(a)(1) of the Act when Nieves stood in front of the building on the morning of 27 August and observed the union organizers conversing with employees who were reporting for work. As the Board found in *Milco Inc.*, 159 NLRB 812, 814 (1966), enfd. 388 F.2d 133 (2d Cir. 1968), "[u]nion representatives

and employees who choose to engage in their [u]nion activities at the [e]mployer's premises should have no cause to complain that management observes them." Accord: *Chemtronics Inc.*, 236 NLRB 178 (1978); *Larand Leisurelies, Inc.*, 213 NLRB 197, 205 (1974), enfd. 523 F.2d 814 (6th Cir. 1975). In this case, any conversations between union organizers and Respondent's employees were conducted in full public view outside Respondent's place of business, and Respondent's observation of this activity was not unlawful surveillance. Therefore, we shall dismiss this allegation of the complaint.

3. We agree with the judge that Respondent's discharge of Angel Avila did not violate Section 8(a)(4), (3), and (1) of the Act, but we do so only for the reasons set forth below.

As the judge found, Avila was unlawfully laid off on November because of his support for the Union, on approximately the same day Respondent had received a complaint alleging several violations of Section 8(a)(1) of the Act. The judge concluded that Respondent's purported reason for laying off Avila, lack of work, was a pretext. He reasoned that Avila was Respondent's most senior employee, that he had never before been laid off, that he was a known union adherent,<sup>4</sup> and that he was laid off the same day the complaint arrived.

On 23 December a second complaint against Respondent issued alleging the unlawful layoff of Avila. On 30 December Respondent contacted Avila requesting that he return to work on 5 January 1982. On Avila's third day back, he was given 14 molds to work on, which he testified was a larger order than he had ever worked on before. However, the judge credited the testimony of Nieves and employee Garcia who stated that 14 molds was not an unusually large order and was in no way an onerous work assignment. Avila, nonetheless, refused to work on all 14 molds at once and was discharged that day as a result.

Specifically, the judge credited Nieves' testimony that he told Avila he needed all the molds done so he could make one shipment of the entire order, and that Avila refused to do it. Nieves then left without saying anything and returned an hour later, again telling Avila that the job was urgent. Avila was not swayed. Nieves went back to the office, told Yahre about the situation, and together they approached Avila a third time. When Avila continued to refuse to work on all 14 molds, they returned to the office to make out his final check. Nieves then handed the check to Avila and dis-

<sup>1</sup> Respondent and the General Counsel have excepted to certain credibility findings made by the judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> We shall modify the Judge's recommended Order to reflect our findings that Respondent interrogated an employee in violation of Sec. 8(a)(1) of the Act and that it did not engage in unlawful surveillance of its employees' union activities.

<sup>3</sup> All dates are in 1981, unless otherwise indicated.

<sup>4</sup> Avila was the only employee who refused to sign the antiunion petition.

charged him. The judge did not credit Avila's statement that Nieves threatened him with bodily harm for his use of the Board's processes, and he found that Avila was fired only for refusing to do the work assigned to him. The judge concluded that Avila's discharge did not result from his union activity because, by January 1982, there was no union activity; rather, the Union's efforts ceased in November 1981.

We disagree with the judge's conclusion that Avila's union activity was too remote in time from his discharge possibly to have been a motivating factor in Respondent's discharge of him. Instead, we find that the General Counsel did make out a *prima facie* case that Avila was fired because of his union support and his use of the Board's processes. Avila had been discriminatorily laid off on 9 November because of his union sympathies and was recalled just days after Respondent received the complaint alleging his layoff to have been unlawful. We find, based on the judge's credibility resolutions, that Respondent successfully rebutted the *prima facie* case made out by the General Counsel. *Wright Line*, 251 NLRB 1083 (1981). The judge credited Nieves' version of the discharge incident; i.e., that Nieves and Yahre both asked Avila to complete all 14 molds, which was not an unusually large number to work on; that Avila refused; and that, after the third request, Nieves gave Avila his final paycheck and dismissed him for the sole reason that he refused to perform his duties. We shall therefore dismiss the portion of the complaint alleging that Avila's discharge violated the Act.

### ORDER

The National Labor Relations Board adopts as its Order the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Emenee Accessories, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and insert the following:

"(b) Interrogating employees regarding their union activities."

2. Substitute the attached notice for that of the administrative law judge.

### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT threaten our employees with plant closure in order to induce them not to select Local 132, or any other labor organization, to represent them.

WE WILL NOT interrogate our employees regarding their union activities.

WE WILL NOT aid or abet our employees in the preparation of any antiunion petition, nor will we deliver any such petition to Local 132 or to any other labor organization.

WE WILL NOT lay off our employees because of their activities on behalf of and sympathies for Local 132, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL reimburse Angel Luis Avila and make him whole for any loss of pay he suffered by reason of the discrimination practiced against him, with interest.

EMENEE ACCESSORIES, INC.

### DECISION

#### STATEMENT OF THE CASE

ARTHUR A. HERMAN, Administrative Law Judge: On September 24, 1981, Plastic Moulders & Novelty Workers' Union Local 132, International Ladies' Garment Workers' Union, AFL-CIO, herein called Local 132 or the Union, filed a charge against Emenee Accessories, Inc., herein called Respondent, in Case 2-CA-18351; on November 6, 1981, a complaint issued thereon, alleging that Respondent interrogated its employees regarding their union activities, threatened its employees with plant closure if they selected Local 132 to represent them, initiated a petition for its employees to sign rejecting Local 132, and urged its employees to spy on other employees regarding their union activities, all in violation of Section 8(a)(1) of the National Labor Relations Act. On November 10, 1981, Angel Luis Avila, an employee of Respondent, filed a charge in Case 2-CA-18425, and on December 3, 1981, filed an amended charge; on December 23, 1981, a complaint issued thereon, alleging that Respondent engaged in surveillance of union meetings with employees of Respondent, and laid off Avila because he supported Local 132, all in violation of Section 8(a)(1) and (3) of the Act. On January 7, 1982, Avila filed another charge in Case 2-CA-18509, on which a third complaint issued on January 27, 1982, alleging that Re-

spondent threatened Avila with bodily harm, imposed more onerous terms and conditions of employment on Avila, and finally discharged Avila on January 7, 1982, all because he supported Local 132, and filed a previous charge and gave testimony in connection therewith, and all in violation of Section 8(a)(1), (3), and (4) of the Act. Thereafter, on June 15, 1982, an order consolidating cases and notice of hearing issued incorporating all of the complaints. Respondent duly filed answers to the complaints denying the commission of unfair labor practices.

Upon due notice, a hearing was held before me in New York, New York, on July 1 and 2, 1982. Briefs were filed by the General Counsel and Respondent and have been duly considered.

On the entire record in this case, the briefs, and from my observation of the witnesses, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent is a New York corporation engaged in the manufacture, assembly, and nonretail sale of novelties and related products at its plant located in New York, New York. Annually, Respondent sells and ships goods and materials valued in excess of \$50,000 directly to points located outside the State of New York. The complaints allege, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION

The complaints allege, Respondent admits, and I find that Local 132 is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent's plant is located at 270 W. 39th Street, in New York City, an industrial building occupied by many tenants wherein Respondent leases approximately 75 percent of the space on the 18th floor. Its two principals are Herbert Yahre, its president, and Eudardo Nieves. Respondent employs approximately 15 production employees consisting of mold makers, casters, solderers, cleaners, polishers, and general floor workers. Among the novelties manufactured by Respondent are buckles, earrings, neck drops, and trophy tops. Rubber molds of the novelties are placed in machines, powdered, and covered, and then liquid metal is poured in. The machines spin for a short period of time, then stop, and the figures are removed. The process is then repeated until all of the molds have been casted.

On Wednesday, August 26, 1981, the Union began an organizing campaign among Respondent's employees.<sup>1</sup> Three of its organizers, namely, Melida Pena, Roberto Marrero, and Mario Sanchez, stationed themselves outside the entrance to the building occupied by Respondent at or about 7:30 a.m. They approached persons who appeared headed toward the building and inquired as to

whether they were employees of Respondent. Upon receiving an affirmative response, the employees were asked if they were interested in being represented. The organizers stayed for about an hour, returned again at noon, and again at 4 p.m. Melida Pena testified that, when they repeated this procedure the next day, she noticed that the employees ignored the organizers. She stated also that one of the employees whispered to them that Nieves was standing in front of the building watching the organizers and the employees,<sup>2</sup> and that he stayed there until the organizers left about an hour and a half later. On Friday, August 28, according to Pena, the organizers returned to the premises but found that the employees would have nothing to do with them. At noon, the three organizers, plus Leo Suarez, a Local 132 business agent, went to the 18th floor and engaged Nieves in conversation. Pena testified that Suarez told Nieves that Local 132 was trying to organize the shop but Nieves responded that he could not afford a union, and that he had asked the employees and they told him that they did not want a union. Nieves also told Suarez that he was going to talk to Sam Eisenberg, the Union's manager-secretary.

Nieves testified that he had been a Local 132 shop chairman for 10 years prior to forming his own business; that the first time he learned about the Union's organizational drive was at lunchtime when Radames Feliciano, an employee, told him; that he saw the union organizers outside the building on only one occasion while he was passing by to go somewhere; that a day or two later, union organizers came to the shop and told him that they wanted to organize the employees, to which he responded that that was their problem; that about 3 days later, he called Eisenberg and asked him what was going on, and Eisenberg invited him to come to the union office; that he went to Eisenberg's office on a Tuesday in late August and told Eisenberg that he had a small shop and that he could not compete with the Union. Whereupon, according to Nieves, Eisenberg said that it was not the Union's fault, but that the employees wanted the Union; and so Nieves volunteered, that if Eisenberg wanted, "I could call the workers and get an answer for him."

Eisenberg testified that Nieves called him on Friday, August 28, and asked, "Sam, what are you trying to do to me?"<sup>3</sup> "You sent your people here to organize my shop. My workers don't need a union. I give them everything. They don't want a union. . . . Why are you picking on me? We're a small shop, and we can't afford a union." Eisenberg then invited Nieves to his office and they met on Tuesday, September 1. Again, Nieves repeated, "We don't need a union, I can't afford a union, my workers don't want a union." When Eisenberg asked Nieves how he knew the employees did not want a union, Nieves responded, "Well, I go back, I'm going to talk to them." Whereupon, Eisenberg advised him not to do it because he would be violating the law. Nieves said

<sup>2</sup> On cross-examination, Pena stated that she did not see Nieves on August 26, but did see him on August 27.

<sup>3</sup> According to Eisenberg, he had known Nieves for almost 20 years, and he quotes Nieves as having said to him during the call, "I look up to you like a father. Why are you trying to do this to me?"

<sup>1</sup> Respondent's employees had not been previously represented by any labor organization.

he would let Eisenberg know, but he did not contact him. Eisenberg further states, however, that he did receive a telephone call from Yahre on Friday, September 4, and quotes Yahre as saying, "Our workers don't want the Union. They don't need the Union." When Eisenberg asked him how he knew, Yahre replied, "I spoke to them. We asked all the workers, and they don't want the Union. In fact, I'm going to send you a list with their names and their signatures, that they don't want the Union." On September 9, Eisenberg received what I shall call a petition, addressed to Eisenberg, written on Respondent's stationery, which reads as follows: "The undersigned Employees of Emenee Accessories have taken a vote and have elected not to have a union represent us." The petition bore the signatures of 13 employees<sup>4</sup> and was notarized by Theresa Radzewich.<sup>5</sup>

Yahre's testimony explains how the petition came about:

One of my workers came to me one day, I think it was a Thursday, he asked me if they could stop work, my shop could end work early, he'd like to hold a meeting between him and the workers.<sup>6</sup>

I asked him what the meeting was about. He said to me, the union wants to come into the place, and I'd like to speak to the workers about it.

I told him all right. So, at about a quarter after four, they stopped working.

I walked into the office, and they held their meeting outside. I didn't hear what was said at the meeting.

Then my worker came in to me, the next morning. He told me that he spoke to everybody in the factory, and he wanted to know if they want a union or not.

He told me that the people in the factory do not want a union, and he'd like to send such a letter to the union, but he doesn't know how to word it, would I please write the letter for him.

I wrote the letter, and gave him back the letter. And then I didn't see it until he handed it back to me with these signatures on it, and he asked me if I would take it down and have it notarized.

Q. And did you take it down the next morning, take it down to get it notarized?

A. Yes, I did.

Q. And where did you go to get it notarized?

A. I went to the [Bank] on the corner of 38th Street and Eighth Avenue.

Q. And when you went down, did they notarize the document?

A. No.

Q. Why?

A. The notary told me that each witness has to swear and sign in front of the notary that what it says on top is true.

Q. And what did you then do?

A. I took the letter back to my place. I rewrote the top, I explained the situation to the people in the factory, I told them we all have to go—you'll all have to go and sign in front of a notary, personally.

A. They all went down to the bank, all in one time, each individual raised their hand and swore in front of the notary that this was true, and they gave me back the letter to send to the union.

Q. Did you, in fact, send General Counsel's Exhibit No. 2 to the union?

A. Yes, I did.

Q. Now, did you ask any employee to sign this letter?

A. No.

Q. Did you ever asked Avila to sign this letter?

A. No.

Q. Either in the place, or before the notary?

A. No.

On cross-examination, Yahre admitted that he had been aware of the Union's organizing campaign for about a week prior to the signing of the petition, that he accompanied the employees when they went to the bank to have their signatures notarized, that he observed that Avila had not signed the petition, that he mailed the petition to Eisenberg, and that he called Eisenberg to tell him about the petition.

Avila testified that he was hired by Respondent in November 1974, and that although there were layoffs of other employees in the slow season over the years, he enjoyed uninterrupted employment until his layoff on November 9, 1981.<sup>7</sup> He stated that he engaged the Union's organizers in conversation one morning in front of the premises during the latter part of August 1981 and that he attended an afternoon meeting of all employees on the premises about the same time. According to Avila, Yahre addressed the employees and Feliciano interpreted for him. He stated that Yahre told the employees that, if they signed cards for the Union, Respondent would have to close the factory for 6 months; nothing also was said at the meeting. Avila also testified that, when he arrived at work the next morning, in addition to the union organizers being there, Yahre and Nieves were also in front of the building;<sup>8</sup> that as he was entering the building along with another person, Julio, union organizer Marrero engaged Julio in conversation, and Nieves came in behind them as they approached the elevator, but did not enter the elevator with them. Avila further testified that one morning in early September 1981 as he was working in the shop Yahre approached him and asked him to sign a paper saying that he did not want the Union;<sup>9</sup> Avila refused to sign. Shortly thereafter,

<sup>4</sup> Avila's signature is not on the petition, and it appears that he was the only employee who refused to sign it.

<sup>5</sup> Radzewich is an employee of the Franklin Savings Bank.

<sup>6</sup> It was established on cross-examination that the worker's name was Radames Feliciano, a solderer.

<sup>7</sup> Yahre admitted that Avila was Respondent's first employee and had seniority over all the other employees. It was Avila's uncontroverted testimony that Respondent entrusted him with a set of keys to the premises so that he could open up in the morning. Although Avila regarded himself as a caster, and Respondent concurred with that classification, Avila also claimed that he did soldering, washing and polishing, and deliveries.

<sup>8</sup> Avila stated that in the 7 years that he had been working for Respondent he had never seen Yahre or Nieves in front of the building when he arrived at work.

<sup>9</sup> Just before Yahre approached Avila, Avila saw Yahre ask Isidro Garcia, a caster, to sign the petition and Garcia complied.

Nieves came by and inquired of Avila why he did not sign the paper. Avila again refused to sign, and Nieves told him that Avila would be responsible if anything happened at the plant. Later that day, at or about 2:30 p.m., Avila stated that all of the employees were told to go to the bank; Yahre went along, and all of the employees, with the exception of Avila, signed the petition in front of a notary public.

Hector Oliveres, a solderer, was called as a witness by Respondent. He testified that he was present at a meeting in the plant in late August or September 1981 at which Feliciano led a discussion on whether the employees wished to have a union represent them, and that neither Nieves nor Yahre was present. He stated that the employees decided against having a union, and that the next day he signed the petition referred to above. In response to my questions, Oliveres said that the employees went to the bank with Yahre and that he signed the petition in the bank. On cross-examination, Oliveres admitted that he had had a problem with a former employer and that the Union did nothing for him. He also stated, on cross-examination, that the petition had been passed around at the meeting in the plant, and that he signed it at that time; he placed the time around 4:30 or 5 p.m.; yet, he also stated that that same afternoon, after the meeting, all of the employees were told to go to the bank by Yahre because the original petition that they had signed was not suitable. Another solderer, Adelila Lugo, was called by Respondent to testify regarding the meeting and the bank incident and her testimony tracks Oliveres' testimony, except that she added the fact that the paper she signed at the meeting had no writing on top; it was a blank piece of paper.

The above narration of fact led Local 132 to file its charge in this proceeding on September 24, 1981, despite the fact that the Union ceased its organizational activities in early September, and did not resume such activity until the first week in November 1981.<sup>10</sup> Avila testified that as he arrived at work on November 2, 1981, he saw the union organizers outside the building. As he stopped to converse with them, Nieves came along and stood about 7-10 feet away from Avila watching Avila's group. After about 10 minutes Avila went into the building while Nieves remained outside. One week later, Monday, November 9, 1981, at 4:30 p.m., as Avila was preparing to leave the plant, Yahre told Avila that he was being laid off because there was no work for him, and that he should call the plant the next day. Avila called on November 10, but Yahre told him there was no work.<sup>11</sup> Avila continued to call on several occasions for about a week and a half, but each time he was given the same negative response by Yahre.

Yahre testified that he had laid off Avila because of lack of work. He stated that business is slow from the last week in October through Christmas, and through Respondent Exhibit 1, that on October 22, 1981, Respondent laid off nine employees of various classifica-

tions other than caster,<sup>12</sup> and that on November 5, Justo Morales, a caster, was also laid off. Yahre claimed that employees "were laid off according to seniority, and other reasons." When pressed for "other reasons," he responded, "Type of work, the quality of the work they did, and business reasons. I have some people that work better than others." But, when asked further, on direct examination, why Avila was laid off, Yahre responded, "Lack of work." Yahre went on to say that about a week to 10 days after Avila was laid off, Respondent got a rush order and attempted to reach Avila by telephone, but that Avila's number was changed to an unlisted number and therefore he could not be reached.

On December 30, 1981, Respondent sent Avila a registered letter telling him to report for work on January 5, 1982. Avila worked on January 5 and 6. When Avila reported for work on January 7, 1982, he found 14 molds at his table. He placed 4 of them aside and prepared to work on 10, when Nieves approached him and told him to do all 14 molds. Avila protested that it was too much to do at one time but Nieves insisted that he do them all. According to Avila, when he refused, Nieves threatened bodily harm because Avila had spoken to the National Labor Relations Board. With that, Nieves went to his office and Avila worked on only 10 molds. At or about 11 a.m., Nieves returned to Avila's work station and when he saw that Avila had only worked on 10 molds he went back to the office, returned with Avila's check, and told Avila he was discharged. Avila further testified that in all the 7 years that he worked for Respondent he was never asked to do more than 7 or 8 molds at one time, and that on the same day, January 7, when he was ordered to work on 14 molds, Garcia had 7 molds to work on.<sup>13</sup>

Nieves testified that on the morning of January 7 he walked by Avila's work station and saw that he had put aside part of the molds that had been given him; that Nieves told Avila that he needed all the molds done so that he could make one shipment of the entire order, and that Avila refused to do it. Nieves stated that he said, "Nothing. I went back to my work table." Nieves returned about an hour later and once more noticed that Avila had not done all 14 molds. Nieves again told Avila the urgency of the job, but to no avail. Whereupon, Nieves went back to the office, told Yahre about the situation, and together they approached Avila a third time. Avila continued to refuse, and they returned to the office to make out his final check. Nieves handed it to Avila and discharged him. Nieves further testified that on previous occasions Avila had worked on more than 14 molds and had never complained, that Garcia and Morales had each worked on more than 14 molds at a time, and that it was part of the normal production process.

<sup>12</sup> Feliciano was one of the nine employees laid off. The exhibit shows him returning to work on January 21, 1982, but Avila's uncontroverted testimony was that when he returned to work on January 5, 1982, Feliciano was working. Feliciano was not called to testify.

<sup>13</sup> Garcia testified on behalf of Respondent, but when asked by the General Counsel how many molds he had to work on that day he could not recall. Garcia did state, however, that he had worked on as many as 18 to 20 molds at one time and that it is not difficult to do 14 molds.

<sup>10</sup> Coincidentally, a complaint based on the Union's charge issued on Friday, November 6, 1981.

<sup>11</sup> As stated above, Avila filed his first charge against Respondent on November 10, 1981, and amended it on December 3. On December 23, 1981, a complaint based on this amended charge issued.

## Analysis and Conclusions

A. *The August-September Events*

My interpretation of the facts, as stated above, leads me to conclude that the following chronology of events actually occurred. On Wednesday, August 26, 1981, Local 132 began an organizational campaign in front of Respondent's premises. Nieves, by his own admission, was made aware of it at lunchtime that day, and that same afternoon Yahre gathered the employees together to warn them against aiding the Union. On Thursday morning, August 27, Nieves stationed himself at the entrance to the building for the purpose of observing the Union's efforts, and did witness Avila conversing with the union organizers. On Friday, August 28, the union organizers, unable to make any headway in their organizing effort with the employees because of Yahre's threat to close the plant, and Nieves' surveillance, approached Nieves on Respondent's premises, and this prompted Nieves to call Eisenberg the same day and arrange for an appointment to see him the following Tuesday, September 1. Nieves' own testimony regarding his phone conversation and meeting with Eisenberg revealed his desire not to be organized. Following the fruitless meeting on September 1 between Eisenberg and Nieves, Yahre, at the urging of his employee-interpreter Feliciano, composed the petition which was signed by all the employees, except Avila, and sent to Eisenberg on Friday, September 4, 1981.

I draw these conclusions because I credit the testimony of Avila on this phase of the proceeding. He impressed me as a frank and honest witness who related objectively the happenings that occurred at or near Respondent's premises on August and September 1981. On the other hand, I found Yahre's testimony unconvincing. In response to a question on cross-examination, "Did you and Mr. Nieves, at this time [September 1981], discuss your position on whether you wanted a union in there or not?" Yahre responded, "We didn't care—yeah, we spoke about it, but it didn't make a difference to us." Yet when Yahre and Nieves became aware of the Union's organizational campaign Nieves made a special trip to Eisenberg's office protesting to Eisenberg that he would not be able to compete in the industry if his employees were organized. And, when Feliciano asked Yahre to word the petition, he admittedly did it and escorted the employees to the bank for proper notarization. I find such actions inconsistent with Yahre's expression of indifference and I discredit his testimony in this regard. Accordingly, I find that Yahre did threaten the employees with plant closure if they assisted the Union, and that such conduct violates Section 8(a)(1) of the Act. And, when Nieves was questioned regarding his observance of the union organizers on August 27, he half-heartedly admitted that he did see them on one occasion when he was on his way somewhere. Yet the testimony on this point, by Avila and Pena, whom I also credit, was more detailed and more plausible, and I find therefore that Nieves did engage in surveillance on August 27, 1981, in violation of the Act.

Insofar as the petition is concerned, I am convinced that Yahre aided and abetted Feliciano in its preparation,

permitted its circulation among employees during work-time in order to obtain signatures, assisted in its proper execution by escorting the employees to the notary public, and took it upon himself to mail it to the Union. And therefore, in light of Respondent's antiunion conduct as found above, I further find that Yahre's action *in re* the petition restrained and coerced employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1) of the Act.<sup>14</sup>

B. *The November Events*

As stated above, the General Counsel alleges and Respondent admits that Avila was laid off on November 9, 1981. For a better perspective of what transpired, however, one must look to the surrounding circumstances. It is uncontroverted that the Union, having filed its unfair labor practice charge against Respondent on September 24, ceased its activities in September, but resumed its organizational campaign once again on Monday, November 2, 1981. As Avila arrived for work that day, he was observed by Nieves conversing with the Union's organizers. On Friday, November 6, 1981, a complaint issued against Respondent, and it must be presumed that Respondent received a copy of the complaint on that fateful day, Monday, November 9. At the close of business that day Avila was told by Yahre that there was no work for him, and that he should keep in touch. Avila claims that he did contact Respondent on several occasions over the next week and half, but that no work was available.

Respondent contends that theirs is a seasonal industry and that October through December of every year is the slow season. It supports its contention by placing in evidence a list of employees laid off commencing on October 22 (Resp. Exh. 1). In addition, Yahre testified that about a week or so after Avila's layoff, an attempt was made to recall him because of a rush order that Respondent had gotten, but to no avail because Avila had his telephone changed to an unlisted number. In further support of its contention that Avila's layoff was nondiscriminatory, Respondent cites the fact that Feliciano, the instigator of the petition and its most antiunion employee, was one of the employees laid off on October 22.

The General Counsel contends that the layoff of Avila on November 9 was for discriminatory reasons. It cites the fact that Avila was the one and only employee of Respondent when it commenced its business 7 years ago, its senior employee who was capable of doing other jobs besides casting, and an employee who never before had been laid off by Respondent in all of the years he worked there. The General Counsel further contends that Respondent was well aware of Avila's preference for the Union, citing the fact that Avila was the only employee who did not sign the petition, a fact well known to Respondent, and that with the resumption of union activity on November 2 Avila was observed by Nieves conversing with union organizers.

I conclude that Avila's layoff for lack of work was a pretext by Respondent for ridding itself of a union supporter. First, considering the fact that Avila was Re-

<sup>14</sup> *River Togs*, 160 NLRB 58, 60-61 (1966).

spondent's eldest employee in terms of service and its initial employee to boot, it appears unlikely that such an employee would be let go before all of the remaining employees would be laid off, especially in light of the fact that never before had Avila been laid off. Second, Respondent claims that an attempt was made to recall Avila but to no avail. Yet, when Respondent sought Avila's return in January 1982 it found a means by which it could reach him; namely, the postal service. And, third, Respondent's layoff of Feliciano does not in any way justify its action toward Avila. No one doubts the fact that Respondent was experiencing a slowdown in business when it engaged in laying off employees in October 1981. The economic necessity had been established. But, its choice of employees for layoff becomes suspect when it includes its most senior employee, and no valid reason is advanced for selecting him. In addition, one must not lose sight of the fact that Avila had been known to Respondent to be a union adherent, and, on the very day that a complaint against Respondent, based on a charge filed by the Union, arrives on its premises, Avila is laid off.<sup>15</sup> It is for all these reasons that I conclude that Avila's layoff was directly related to his union inclinations and therefore was of a discriminatory nature. I find, therefore, that Respondent has violated Section 8(a)(1) and (3) of the Act by laying off Avila on November 9, 1981.<sup>16</sup>

### C. The January 1982 Discharge of Avila

On Wednesday, December 23, 1981, the Board's Regional Office issued a complaint against Respondent alleging, *inter alia*, the discriminatory layoff of Avila. On December 30, 1981, Respondent sent Avila a letter requesting that he return to work on January 5, 1982, which he did. Except for the alleged threat by Nieves of bodily harm and Nieves' alleged reference to Avila's use of the Board's processes, it is undisputed that Avila, when faced with the task of working on 14 molds, refused to do so, and was subsequently discharged that day. The General Counsel contends that it was Respondent's plan to recall Avila in order to set him up for a final discharge, to provoke a conflict with him by assigning him an inordinately large volume of work, and then to discharge him when he refused to perform all of the work. Respondent contends that business picked up toward the end of December 1981, and that was the reason for recalling Avila. Respondent further contends that Nieves emphasized the importance to Avila of doing all 14 molds so as to get out an emergency order, and that, when Avila continued to refuse to do all 14, Respondent discharged him. In support of Respondent's position, Nieves and Garcia testified that working on 14 molds at one time was not out of the ordinary, and the General Counsel did not refute this evidence. The only

statement offered by Avila was that in the 7 years that he worked for Respondent he was never asked to work on more than seven or eight molds in a given day. No evidence was offered by the General Counsel to show that working on more than seven or eight molds was injurious to one's health, or required more effort, or as alleged in the complaint, constituted "more onerous terms and conditions of employment."

Under the circumstances, I find that the General Counsel has failed to meet its burden of proof sufficient to sustain the allegation. I do not view Avila's discharge in the same light as I did his layoff, *supra*. In the latter situation, there had been a renewal of union activity immediately preceding Avila's layoff, and Avila had been observed conversing with the Union's organizers. However, in January 1982 there was absolutely no union activity; in fact, it would appear from the evidence presented that the Union's efforts ceased in November 1981. Thus, Respondent's recalling of Avila in January 1982 appears to have been in good faith.<sup>17</sup> And, since I credit Nieves and Garcia on the amount of molds normally used on a given day, I find that Avila's refusal to perform his work pursuant to his Employer's request, and for no other reason, led directly to his discharge.<sup>18</sup> Under the circumstances, I shall dismiss this allegation.

### CONCLUSIONS OF LAW

1. Respondent, Emenee Accessories, Inc., is a employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 132 is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off Angel Luis Avila on November 9, 1981, because of his support of Local 132, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

4. By threatening employees with plant closure in order to induce them not to select Local 132 to represent them; by engaging in surveillance of employees while they spoke to union organizers in nonwork areas on their own time; and by adding and abetting employees in preparation and delivery to the Union of an antiunion petition thereby restraining and coercing employees in the exercise of their Section 7 rights, Respondent has violated Section 8(a)(1) of the Act.

5. Respondent did not engage in any other unfair labor practices alleged.

### THE REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it

<sup>15</sup> It is noted that he was the only employee laid off on that day.

<sup>16</sup> This conclusion I do not construe to mean that I have found an independent violation of Sec. 8(a)(1); i.e., the allegation that Nieves engaged in surveillance on November 2. To the contrary, I find that Nieves' presence at the time Avila conversed with the union organizers was purely coincidental and impossible to have been planned. As stated by Trial Examiner John F. Funke in *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972), "If a union wishes to organize in public it cannot demand that management must hide." I shall, therefore, dismiss this 8(a)(1) allegation.

<sup>17</sup> Although the recall of Avila on January 5 may have been precipitated, in part, by the issuance of the complaint in Case 2-CA-18425 on December 23, I credit Respondent when it stated that there had been an increase in business activity at the end of December, and that Avila was needed to do the work. Otherwise, there would not have been 14 molds to work on in the first place.

<sup>18</sup> In reaching this conclusion, I also credit Nieves in his denial of the allegation that he threatened bodily harm to Avila or accused him of availing himself of the Board's processes. I, therefore, shall dismiss those allegations in the complaint.

cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily laid off Angel Luis Avila on November 9, 1981, I shall recommend that Respondent be required to make Avila whole for any loss of earnings he may have suffered as a result of the discrimination against him. The loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>19</sup>

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>20</sup>

The Respondent, Emenee Accessories, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure in order to induce them not to select Local 132, or any other labor organization, to represent them.

(b) Engaging in surveillance of employees' union activities.

(c) Aiding and abetting employees in the preparation and delivery to the Union, or any other labor organization, of any antiunion petition.

<sup>19</sup> Inasmuch as I have found that the reinstatement of Avila on January 5, 1982, was in good faith, and his subsequent discharge on January 7, not violative of the Act, I shall not order reinstatement to Avila, and shall limit his reimbursement remedy to the period from November 9, 1981, the date of his discriminatory layoff, to January 5, 1982.

<sup>20</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Laying off employees because of their activities on behalf of any sympathies for the Union, or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Reimburse Angel Luis Avila and make him whole for any loss of pay suffered by reason of the discrimination against him in the manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its New York, New York, place of business, copies of the attached notice marked "Appendix."<sup>21</sup> Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by the Respondent authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

<sup>21</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."